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No. 78-12

In the Supreme Court of the United States

OCTOBER TERM, 1978

BENEDETTO CONIGLIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner challenges the admissibility of out-of-court statements of his co-conspirators.

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to distribute heroin and conspiring to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment, to be followed by a three-year term of special parole.[1] The court of appeals affirmed the judgment in open court and delivered a brief oral opinion (Pet. App. 1a-3a).

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[1]Also charged with petitioner in the indictment were co-defendants Wai Mow Chin, Dominick Forte, and Patrick DiLacio; all three entered guilty pleas. Chin was sentenced to two years' probation and

The evidence at trial showed that petitioner, together with Wai Mow Chin, Dominick Forte, and Patrick DiLacio, conspired to purchase and possess with intent to distribute five pounds of pure Asian heroin. Petitioner was the central figure in the conspiracy, both as the source of funds for the deal and as the person responsible for approving the transaction.

In late June of 1977, Peter Pao, an undercover agent assigned to the Drug Enforcement Administration, met with co-defendant Wai Mow Chin and offered to sell him a large amount of heroin. Chin said he believed co-defendants Dominick Forte and Patrick DiLacio would be interested in buying as much as 15 pounds of heroin (Tr. 25-32). Agent Pao subsequently met with Chin and told him he would be willing to sell five pounds of heroin (Tr. 33-39). Chin then introduced Agent Pao to Forte, to whom Pao made an offer to sell the heroin (Tr. 42).

On the evening of July 19, 1978, Chin told Pao that one of Forte's associates, co-defendant DiLacio, was interested in buying the heroin (Tr. 44-47; Gov't Exh. 20A) and that "his people" could supply the money for the purchase. After further negotiations, DiLacio agreed to purchase five pounds of heroin (Tr. 49-51; Gov't Exh. 20C). While negotiations for the purchase were being conducted, calls were made from Forte's home to Deer Park, New York, and Fort Lauderdale, Florida, where petitioner had residences (Tr. 152, 204). At a subsequent meeting, DiLacio told Pao that he and his "partner," who was then in Florida, would pay $230,000 for the five pounds of heroin, and that his " partner" would be there

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a $5,000 fine; Forte was sentenced to five years' probation; and DiLacio was sentenced to eight years' imprisonment, to be followed by a three-year term of special parole. Subsequently, DiLacio's term of imprisonment was reduced to four years.

for the transaction (Tr. 65). On the night of July 26-27, Chin told Pao that DiLacio's partner was at Forte's apartment (Gov't Exh. 20G). That same night, surveillance agents saw petitioner arrive at Forte's address with DiLacio, enter the building, and leave after a brief stay (Tr. 133-136). Shortly thereafter, Chin told Agent Pao that DiLacio and his partner had changed their plans, and that now they were willing to purchase only a single pound of the heroin for $46,000, and that they wanted to test it before buying it (Gov't Exh. 20G).

After further negotiations, in which Chin told Pao that petitioner would not be attending when the money was passed because he "really doesn't want to meet anybody" (Gov't Exh. 26A), Pao agreed to sell a single pound of heroin for $46,000 (Tr. 93). When DiLacio and Chin delivered the $46,000 to Pao, Pao arrested them (Tr. 101-109). Forte was arrested shortly thereafter as he left his apartment. Another agent then placed a call to Forte's apartment and addressed the person who answered as "Benny" (petitioner's nickname). The agent identified himself as a friend and said that DiLacio had been arrested (Gov't Exh. 30). Shortly thereafter, petitioner was seen hurrying out of Forte's apartment. As the agents approached him, petitioner threw a tubular object into the street. The object proved to be a long thermometer of a type used to test heroin (Tr. 188-190; Pet. App. 3a).

2. Petitioner's sole contention is that there was not sufficient independent evidence of his participation in the narcotics conspiracy to permit the admission of the out-of-court statements of his alleged co-conspirators. Petitioner does not challenge the Second Circuit's rule that permits the admission of co-conspirators' statements if the defendant's participation in the conspiracy is

established by a preponderance of independent evidence. See *United States* v. *Geaney*, 417 F. 2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). Contrary to petitioner's claim, it is clear that the independent evidence was sufficient to justify the admission of the co-conspirators' declarations against him.

During the evening of July 19, co-conspirator DiLacio committed the conspirators to the purchase of five pounds of heroin for $230,000 only minutes after making telephone calls to Deer Park, New York, and Fort Lauderdale, Florida, where petitioner had residences. Less than an hour after petitioner left a meeting with the conspirators, during the early morning of July 27, Chin changed the terms of the offer from a five-pound purchase to the purchase of a one-pound sample of the heroin. Moreover, petitioner was present at Forte's apartment, where the drug purchase was to be completed (Tr. 98-99, 187-188), while Chin and DiLacio were delivering the $46,000 to Pao. Finally, in response to the fabricated warning call to petitioner at Forte's apartment (Tr. 170-171; Gov't Exh. 30A), petitioner fled from the apartment in haste, and when he was approached by government agents, petitioner furtively disposed of a 14-inch thermometer, of a type usable for testing heroin (Tr. 189-190, 197-198).

In sum, a fair preponderance of independent evidence established that petitioner participated in the drug conspiracy with Chin, Forte, and DiLacio. The trial court thus properly admitted into evidence various out-of-court statements of the co-conspirators identifying petitioner as their leader.[2]

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[2]Petitioner has not claimed that the admission of the co-conspirators' declarations in this case would violate the standard applied in any other circuit, and we know of no case suggesting that it would.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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